IDAHO MINING AND DEVELOPMENT CO. ET AL.

IBLA 93-616 Decided January 25, 1995

Appeal from the decision of the Idaho State Office, Bureau of Land Management, rejecting "petition for acceptance of performed and paid for assessment work in lieu of a holding fee" on 12 blocks of mining claims. IMC 415, etc.

Affirmed.

1. Mining Claims: Abandonment ! ! Mining Claims: Rental or Claim Maintenance Fees: Generally ! ! Mining Claims: Rental or Claim Maintenance Fees: Small-Miner Exemption

   Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102 ! 381, 106 Stat. 1378 ! 79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Except for the small-miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act.

APPEARANCES: Joe Swisher, Cottonwood, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Joe Swisher, acting on behalf of Idaho Mining and Development Company, et al. (appellants), has filed a notice of appeal from the decision of the Idaho State Office, Bureau of Land Management (BLM), rejecting a "Petition for Acceptance of Performed and Paid for Assessment Work in Lieu of a

Holding Fee" (Petition) on 12 blocks of mining claims. 1/ The Petition seeks a waiver of the rental fees imposed by the Act of October 5, 1992, 106 Stat. 1374, 1378 ! 79, for those claims, as well as an exemption from the consequences of failure to pay those fees.

The Petition points out that appellants own large blocks of unpatented mining claims, and that they formulated a 5 ! year plan to develop all the properties. In addition to man hours involved in research and claim development, they have paid large sums for professional geological and mining engineering workups on mining properties, as well as installation of equipment and maintenance of access road. Appellants argued:

> [T]he present payment "in lieu of assessment work" simply won't work in our case as our plan requires that the work be done and we have, by necessity, and responsibility to our stockholders, had to continue in order that our companies advance and do not fail. Having to pay the $200.00 holding fee amounts to a double assessment fee and more cost to us. Having to come up with an additional $460,000 on top of the beneficial claim work presently being done is impossible and would work as a "taking" against us, causing us to lose our mining properties, which according to federal and state statutes are real property. [Emphasis in original.]

(Petition at 6).

BLM, in denying the Petition, ruled as follows:

> On October 5, 1992, Congress enacted Public Law 102 ! 381 (106 Stat. 1374), which among other things, requires that "each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993: * * * That for fiscal year 1994, for each unpatented mining claim, mill or tunnel site

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1/ The Petition, which was signed by Joe Swisher, indicates that it is on behalf of the following concerns: Idaho Consolidated Metals Corporation, Idaho Mining and Development Company, Silver Crystal Mines, Incorporated, Idaho Non-Metallic Minerals, Incorporated, and Del Steiner/Joe Swisher, et al. The mining claims covered by the Petition are evidently owned by those concerns.

Pursuant to our order of Oct. 6, 1993, Swisher presented evidence establishing that he is authorized under 43 CFR 1.3(b)(3) to represent all appellants in this appeal. His appearance is hereby formally recognized.

In our Oct. 6, 1993, order, we granted expedited consideration to this appeal.

> on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28 ! 28[e] and filing requirements of FLPMA (43 U.S.C. 1744(a) and (c)), each claimant shall, except as provided otherwise by this Act, pay an annual claim rental fee of $100 per claim to the Secretary of the Interior or his designee on or before August 31, 1993, in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the following assessment year beginning at noon on September 1 . . ."
>
> The Statute further provides that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant . . ."
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> On July 15, 1993, final regulations were published to implement the provisions of the Act. These regulations, which establish the procedures for paying the required annual rental fee and the procedures by which small miners may obtain an exemption, make no provision for an exemption except for those claimants who hold "10 or fewer mining claims, mill sites and tunnel sites" and meet other specific conditions. 43 CFR 3833.1 ! 6.
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> Therefore, your "Petition for Acceptance of Performed and Paid for Assessment Work in Lieu of a Holding Fee" is denied.

On appeal, appellants generally challenge the constitutionality of the Act, arguing that it constitutes a rental charge on privately owned property. They argue that "a rental fee in lieu of or instead of assessment work has to be discretionary to the claimant or it violates his property right to equal protection under the law and his right to due process" (Statement of Reasons at 3 (emphasis in original)). Appellants assert that approximately $1.5 million has been expended to benefit the claims in the past 18 months, and that past claim development and exploration costs exceed $7 million. Appellants complain that they were not granted enough time to raise the required money, not being sure as to the requirements of the Act until publication of new regulations in the Federal Register on August 4, 1993, only 3 weeks before the money was required to be filed.

[1] On October 5, 1992, Congress passed the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102 ! 381, 106 Stat. 1374. A provision of that Act relating to mining established that

> for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28 ! 28e), and the filing requirements contained in section 314(a) and (c) of the

> Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision governing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of the $100 rental fee on or before August 31, 1993. 106 Stat. 1378 ! 79. The Act further provided, under certain conditions, for an exemption from the payment of the rental fees for claimants holding 10 or fewer claims, millsites or tunnel sites, the so ! called small-miner exemption. Id.

On July 15, 1993, the Department promulgated regulations to implement the rental fee provision of the Act. 58 FR 38186 (July 15, 1993). Those regulations include a section governing rental fee exemption qualifications, 43 CFR 3833.1 ! 6(a) (58 FR 38199 (July 15, 1993)), which substantially tracks the statutory language and sets forth various conditions, all of which must be met in order to qualify for the exemption. 2/ The regulation provides, in relevant part:

> (1) The claimant shall hold 10 or fewer mining claims, mill sites, and tunnel sites, on Federal lands in the United States. For purposes of determining the small miner exemption, oil shale claims will not be counted toward the 10 ! claim limitation for the small miner exemption to the $100 rental fee. A claimant who owns 10 or fewer claims, mill sites, and tunnel sites, and otherwise meets the requirements of this section, is not precluded from paying the rental fee in addition to filing for a small miner exemption.
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> (2) Mining claims held by a husband and wife, either jointly or individually, or their children under the age of discretion, shall be counted toward the 10 ! claim limit.
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> (3) Mining claims held in co ! ownership, or by an association of locators, by a partnership, or by a corporation, shall be counted toward the 10 ! claim limit for claimants that have an interest in these entities.

2/ The regulations also contain a section, 43 CFR 3833.1 ! 7, governing the filing requirements for rental-fee exemptions (58 FR 38200 (July 15, 1993)).

The issue in this case is whether BLM properly denied appellants' application for acceptance of performed and paid for assessment work in lieu of the holding fee required by the Act. The arguments presented on appeal do not provide a basis for us to grant an exemption from the requirement of compliance with the Act and regulations. Although appellants assert that they had insufficient time to raise the required fees after the promulgation of regulations, the terms of the regulations are not materially different from those of the Act. Thus, appellants had notice as of the passage of the Act in October 1992 that the monies would have to be paid. Further, BLM published a notice on October 16, 1992, that the Act had been passed and that the rental fees would go into effect and be payable on or before August 31, 1993. 57 FR 54102 (Oct. 16, 1992).

The economic hardship imposed upon holders of mining claims by this legislation has been acknowledged by BLM, which has stated:

> Many comments stated that most small miners will not be able to afford the fee or that the fee would have a depressing effect on the mining industry and western economies generally. The rule cannot be amended based on these possible economic effects of the fee, because it has been required by Act of Congress.

58 FR 38186 (July 15, 1993). We agree with this assessment.

Appellants submit that they completed their assessment work between noon on September 1, 1992 (the beginning of the 1993 assessment year), and October 5, 1992, the date of enactment of the Act. 3/ In considering what regulations to adopt, BLM admittedly did consider (in "Alternative Two") exempting claimants who completed the 1993 assessment year work prior to the Act's enactment from the rental fee, provided that they certified that the assessment work was completed during that period. See 58 FR 12879 (Mar. 5, 1993). However, BLM received a joint comment from the Chairman and Ranking Minority Member of the Subcommittee on Interior and Related Agencies stating that "[i]t was our clear intent that an exemption from the fee for assessment year 1993 as suggested in Alternative two not be provided," and noting that the House of Representatives had included such waiver, but that it was deleted by the Senate and not restored in the conference agreement (BLM Answer at Exh. D). Besides the small-miner exemptions, they noted, "no other exemptions or waivers are specified or implied." Id. Finally, they noted that "Alternative one is reflective of the intent of Congress in enacting this provision of law." Id. BLM did not promulgate a regulation allowing for the recognition of assessment work done between the beginning of the 1992-93 assessment year and the date of the enactment of the Act.

3/ BLM's answer points out that that assertion has not been proven (Answer at 5). For the sake of this decision, we shall presume that it is so, without so finding.

While appellants challenge the constitutionality of the Act, contending that the statute effects a taking of property without just compensation, the Board has long held that it has no authority to declare an act of Congress unconstitutional. Amerada Hess Corp., 128 IBLA 94, 98 (1993), and cases cited therein. Such power resides with the judicial branch of Government, not the executive branch. 4/

As to the Act's constitutionality, we note that the Act places responsibility for satisfying the rental fee requirement with the owner of the unpatented mining claim, as Congress mandated "that failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant" (106 Stat. 1379). This language used by Congress is nearly identical to that found in section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1988), which provides that the failure to record the notice of location of a mining claim, millsite, or tunnel site with BLM or file evidence of annual assessment work or a notice of intention to hold "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner."

The Board has consistently held that responsibility for complying with the recordation and filing requirements of FLPMA rests with the owner of the unpatented mining claim or millsite or tunnel site, as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA would, in and of itself, cause the claim or site to be lost. The Supreme Court upheld the constitutionality of section 314 of FLPMA, concluding that a mining claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. United States v. Locke, 471 U.S. 84, 97 (1985). Thus, section 314 of FLPMA is self ! operative, and a claim must be deemed abandoned when an annual filing is not timely received. Ptarmigan Co., 91 IBLA 113, 118 (1986), aff'd, Bolt v. United States, 944 F.2d 603 (9th Cir. 1991). Congress did not provide for waiver of the section 314 requirements, and the Board has held that the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981).

We must assume that Congress was aware of the interpretation that this Department and the courts had given to section 314 of FLPMA and that it intended the present language under consideration to be given the same construction. Thus, there is no reason to deviate from this interpretation

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4/ The record indicates that appellants have filed a complaint for declaratory and injunctive relief challenging the constitutional validity of the annual rental fee provisions of the Act. Idaho Mining & Development Co., Civ. No. 93 ! 334 ! S ! HLR.

in this case. Accordingly, where a mining claimant fails to qualify for a small-miner exemption from the rental fee requirement, there is no other basis for exempting the claimant from the requirements of the Act. 5/ The Department is without authority to excuse lack of compliance with the rental fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences, and the Board may not consider special facts or provide relief in view of mitigating circumstances. Lee H. Rice, 128 IBLA 137, 141-42 (1994).

BLM properly denied appellants' Petition.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 6/

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David L. Hughes
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge

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5/ The record indicates that appellants have deeded interests in certain of their claims in 10 ! claim blocks to individuals and other corporations and filed for certification of exemption from payment of rental fees for many of the claims at issue here for fiscal years 1993 and 1994. BLM has not yet ruled on those filings or issued decisions confirming the voidance of appellants' claims. See BLM's Answer at 5-6.

6/ During the pendency of the appeal, we have received several documents from one Dennis Mac Menamin, an apparent stranger to the present dispute. These documents do not relate to the instant appeal. BLM is directed to review these documents and take any appropriate action.